

**Written Testimony of Lori Kalani
Orrick, Herrington & Sutcliffe**

**Before the State of Connecticut General Assembly
Joint Committee on Energy and Technology
Regarding Connecticut Proposed Bill S.B. 350**

March 4, 2010

Chairwoman Nardello and Chairman Fonfara, and members of the Joint Committee, thank you for the opportunity to testify today. My name is Lori Kalani, and I am an attorney at Orrick, Herrington & Sutcliffe LLP. I am here today on behalf of DIRECTV and DISH Network, the two major providers of satellite TV service in Connecticut.

DIRECTV and DISH Network oppose S.B. 350. This bill would impose a 20% increase in the gross earnings tax on those satellite TV providers who do not provide transmission of the Connecticut Television Network (CT-N). S.B. 350 suffers from an insurmountable legal flaw. It is preempted by federal law, and is therefore unconstitutional. Along with my testimony, I have submitted a letter today that describes this legal defect in more detail.

I would like to focus on the importance that the satellite industry places on providing public interest programming to our subscribers and explain how technology affects the manner in which we provide it.

As users of the public spectrum, the satellite industry appreciates that it has an obligation to serve the public interest. We take this obligation very seriously, and we meet it.

by setting aside four percent of our total channel capacity for not-for-profit public interest programming. Federal law requires that. Satellite subscribers expect and demand it.

But, the "community" we serve is not just the city of Hartford, or even the entire state of Connecticut. Unlike cable providers, which by their very nature serve one market at a time, the community served by satellite providers is the entire nation.

Cable is provided through a vast local land based network. We, on the other hand, provide service by using satellites that largely broadcast programming signals to every customer in the United States. While we offer local broadcast stations within some local markets on regional "spot beams", those beams are now full due to a federal law that requires satellite TV companies to carry all commercial local broadcasts stations. In fact, we do not currently have capacity to provide local broadcast channels to many markets across the U.S.

Being a national service allows us to offer different and equally beneficial public interest programming to our subscribers. As required by federal law, the public interest programming that we carry is available to each and every one of our subscribers across the nation. In fact, precisely because we provide service to the nation as a whole, we can support niche programming that serves the varied interests of subscribers that reside in all corners of the nation. These are interests that we could not serve if we were as geographically limited as our cable competitors.

Some of the public interest channels that we are able to provide include: HITN and Once TV, which broadcast Spanish language educational and lifestyle oriented programming; the Pentagon Channel, which broadcasts military news; NASA TV which covers NASA activities and missions; Colours TV, which offers multi-cultural and multi-ethnic programming; and the Classic Arts Showcase, which plays film clips of the arts from various eras. These are just a few, but the list goes on and on.

Congress determined that because satellite TV is a national, interstate service, it should be subject to a "unified, national system of rules." For just that reason, Congress granted the Federal Communications Commission (FCC) exclusive jurisdiction to regulate the provision of satellite TV programming in the Telecommunications Act of 1996. As described in detail in the letter that I have submitted, this means that Connecticut cannot enact a bill that would impose a penalty on a satellite TV provider who does not transmit the Connecticut Television Network to all subscribers in the State. No matter how you look at it, the bill is directed at an activity that falls within the exclusive purview of the FCC—the provision of satellite TV programming. Accordingly, it is preempted by federal law.

To avoid years of costly and time consuming litigation and potentially refunding all revenue generated from an illegal tax, we urge this Committee to carefully examine the constitutional issues presented by S.B. 350 and oppose the bill.

Thank you for your time and attention. I look forward to your questions.

March 3, 2010

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BY HAND DELIVERY

Energy & Technology Committee Members
State of Connecticut General Assembly

Re: Opposition to Raised Bill No. 350

Dear Energy & Technology Committee Member:

I am writing on behalf of the Satellite Broadcasting and Communications Association and its members DIRECTV, Inc. ("DIRECTV") and DISH Network L.L.C. ("DISH")—the two providers of satellite TV services in Connecticut—to voice our opposition to Raised Bill No. 350 ("S.B. 350"). This bill attempts to do something that has never been done before. It would impose a penalty on satellite TV providers who fail to carry a local public interest channel—in this case the Connecticut Television Network—to subscribers in a particular state.

There is a good reason that no state aside from Connecticut has ever introduced, let alone enacted, a bill like S.B. 350. It is preempted by federal law, and therefore unconstitutional. Congress has made it clear that the right to regulate satellite TV programming rests exclusively with the Federal Communications Commission ("FCC"). See 47 U.S.C. § 303(v). We ask that you reject this illegal attempt to regulate satellite TV programming. Otherwise, the industry will have no choice but to challenge this proposal in court—that is, assuming the General Assembly passes the bill despite this obvious defect. For the reasons discussed below, it is a challenge that we expect to win.

I. The Proposed Legislation is Preempted by Federal Law

The doctrine of federal preemption holds "[w]here a state statute conflicts with, or frustrates, federal law, the former must give way." *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 663 (1993). There are times when Congress fails to define the interplay between federal and state law. When that happens, the task of defining the scope of "implied" preemption can be complicated and uncertain. When, however, Congress addresses the question directly in an express preemption clause, the Supreme Court has described the task of determining whether a law is preempted as "an easy one." *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990). It is simply a matter of following directions.

This is such a situation. Congress's written directions are particularly clear, expansive, and categorical with respect to the regulation of satellite TV programming. Section 303 of the Telecommunications Act of 1996 mandates that the FCC shall have "*exclusive jurisdiction* to regulate the provision of direct-to-home satellite services." 47 U.S.C. § 303(v) (emphasis added). The term "direct-to-home satellite services," in turn, is defined broadly as the "distribution or broadcasting of *programming or services* by satellite directly to the subscriber's premises . . ." *Id.* (emphasis added).

S.B. 350 falls squarely within the preemption clause of § 303(v). The proposed legislation would require satellite TV companies to carry the CT-N as part of the programming offered to Connecticut subscribers or pay a penalty in the form of an additional 1% in gross earnings tax. Or, put another way, to avoid a penalty, and remain on a level playing field with cable and AT&T, the bill would require DIRECTV and DISH *to change the manner in which they provide their respective programming to their customers*. No matter how you look at it, the bill is directed at an activity that falls within the exclusive jurisdiction of the FCC: the *provision of satellite TV programming*. As such, it is preempted by § 303 of the Telecommunications Act.¹

While this is enough, by itself, to render the proposal unconstitutional, it is worth noting that both Congress and the FCC have rejected opportunities in the past to require satellite TV companies to provide local and regional public interest channels to their subscribers. While cable companies are subject to Public, Educational, and Governmental ("PEG") access channel requirements as a result of state and/or local franchising agreements, satellite TV companies do not require the use of public rights of way, and are not, therefore, subject to those requirements. Moreover, unlike cable companies, who distribute programming through vast ground distribution networks that wind under and over Connecticut's streets and telephone poles, satellite TV companies distribute their programming through satellites in outer space. Those satellites only have so much capacity, and simply cannot carry the thousands of local and regional PEG channels that cable companies are required to provide as part of their franchise agreements. Accordingly, Congress does not require satellite companies to carry any particular local PEG programming; instead it requires them to set aside four percent of their nationwide capacity for public interest programming. *See* 47 U.S.C. § 335; 47 C.F.R. § 25.071(f)(1).

¹ The federal government's extensive role in overseeing the satellite industry is no secret. Just last year, the Office of Legislative Research ("OLR") advised the General Assembly that "federal law limits state jurisdiction over the video services industry and gives the [FCC] exclusive jurisdiction over direct broadcast satellite (DBS) companies." Cable TV Competition, 2008-R-0458 at 1 (Aug. 19, 2008).

II. S.B. 350 Would Stifle Competition in the Video Services Market

Given the clarity of the statutory language, there is no need to sift through the legislative history to figure out what Congress meant. Nevertheless, the history of § 303(v) confirms the statute's broad preemptive scope. Since the early 1990s, Congress has sought to promote competition in the market for multi-channel video programming. Looking specifically to satellite TV as a potential competitive check on cable's "undue market power," Congress eliminated a variety of barriers to satellite's success. Pub. L. No. 102-385, § 2(a)(2), 106 Stat. 1460, 1460 (1992) (reprinted at 47 U.S.C. § 521 note).

The Telecommunications Act of 1996 was part of that process. The Act's avowed purposes included "promot[ing] competition" and "encourag[ing] the rapid deployment of new telecommunications technologies." Pub. L. No. 104-104, 110 Stat. 56, 56 (1996). But Congress had more on its mind: It explicitly declared its intention to "reduce regulation." *Id.* Because satellite TV is a "national, interstate" service, Congress insisted on a "unified, national system of rules." H.R. Rep. No. 104-204, at 123 (1995). It concluded that "any additional regulatory burdens imposed by State or local governments would be inappropriate and contrary to the Federal scheme for DBS regulation." S. Rep. No. 103-367, at 64 (1994) (emphasis added).

Rather than subjecting satellite providers to a patchwork of varying state and local regulations that could stifle the expansion of satellite TV, Congress ensured that regulation would be uniform throughout the country. Section 303(v) was Congress's solution to the patchwork problem. The statute both vests jurisdiction in the FCC and blocks any state or local attempts at satellite regulation. Only through such an enactment could Congress shield satellite providers from having to distort their business models to accommodate a dizzying array of state and local laws.

There is no better illustration of the "patchwork problem" than the technical nightmares that DIRECTV and DISH would have to overcome to avoid incurring a penalty under the proposed legislation. As an initial matter, DIRECTV and DISH could only carry CT-N by placing the channel on its nationwide satellite beam. While DIRECTV and DISH offer local broadcast stations in some designated market areas ("DMAs") on regional "spot beams", those beams are now full due to a federal law that requires satellite TV companies to carry all local broadcast stations in each local market it serves. Moreover, even if there was space on those beams, DMAs do not match up exactly with state boundaries, and would not permit the service providers to offer CT-N to all Connecticut subscribers throughout the state.

And, those are just the challenges that DIRECTV and DISH would have to confront to satisfy the requirements of S.B. 350. It is impossible to comprehend the technical and administrative challenges that would engulf the satellite industry once the 49 other states enact their own copy-cat

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statutes. Again, it wasn't the technical administrative burdens imposed by one state enacting this type of law that worried Congress. It was the stifling effect on competition that would result from every state in the nation imposing its own set of programming requirements on satellite TV providers.

In light of these concerns, we ask that you to reject the proposed legislation. In today's economic climate, it makes no sense to enact a law that plainly violates the letter and the spirit of federal law. Should you have any questions, or should you like to discuss the matter in more detail, please do not hesitate to contact me.

Very Truly Yours,

E. Joshua Rosenkranz